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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

v.

MELVIN VARNISH,

Respondent.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October Term, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

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Respondent.

OPPOSING BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below and Jurisdiction

The opinions below and the basis of jurisdiction are as set forth in the Petition.

Constitutional Provisions Involved

United States Constitution, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Questions Presented

1. Do there exist such special and important reasons for the granting of a writ of certiorari in this case as to cause this Court to exercise its sound judicial discretion by granting a writ of certiorari?

2. Whether, viewing the evidence in the light most favorable to the respondent (hereinafter "Mr. Varnish") and giving Mr. Varnish the benefit of every inference favorable to him which the evidence fairly supports, reasonable men may draw different inferences and reasonably differ with respect to any one or more of the following issues:

(a) Whether the article in so far as it related to Mr. Varnish was substantially false, distorted or fictionalized.

(b) Whether the petitioner (hereinafter "Best") would outrage the sensibilities of an ordinary person in whether Best acted in reckless disregard of the truth or falsity, distortion or lack of distortion, or fictionalization or lack of fictionalization.

(c) Whether the falsity, distortion or fictionalization know of the falsity, distortion or fictionalization or the position of Mr. Varnish and whether Best could reasonably foresee that it would do so.

(d) Whether Mr. Varnish was damaged by the falsity, distortion or fictionalization and was there a basis for the award of exemplary damages.

Statement

The present Petition calls upon this Court to review by writ of certiorari findings of fact made by a trial jury receiving proper instructions as to the law. The charge of the Court is set forth in the transcript* on pages 157-172a. On transcript page 174 on line 11, Mr. Taylor, on behalf of Best, stated that he had no exceptions to the charge to the jury. Even in its present Petition, no objection is raised to any aspect of the charge to the jury which in all respects conformed to recent and repeated decisions of this Court. Moreover, no objection was raised in the Second Circuit or in the Petition to this Court to any ruling made during the course of the trial below. Thus, this Court is now asked to devote its time and energies to evaluating the factual determinations unanimously reached by the jury in this case.

The petition for a writ of certiorari thus is based upon the affirmance of a verdict by a jury based upon a charge to which Best had no exceptions (tr. p. 174). Moreover, no objection appears to be raised by Best to any ruling or determination by the Court below other than its denial of motions by Best for a directed verdict and for judgment non obstante verdicto. Thus, the only possible issue for this Court to decide should it grant a writ of certiorari, is whether the trial Court acted legally ni permitting the jury to deliberate and determine the issues in this case on the basis of the record below. The record shows substantial deliberation by the jury in this matter (tr. pp. 174a, 182) before reaching a unanimous verdict for Mr. Varnish (tr. pp. 182-183).

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* References to the Transcript are designated "tr.".

The action was based exclusively on the tort of invasion of privacy as provided under the laws of the Commonwealth of Pennsylvania where Varnish lived on March 8, 1964 when Best published in its publication "The National Enquirer" and widely circulated a writing set forth in Appendix A, footnote 1 pp. A2-A3.**

The writing deals with Mr. Varnish, refers to him by name and purports to describe his actions and reactions in connection with a tragic incident in which his wife killed herself and their three young children on September 27, 1963. Mr. Varnish discovered the bodies upon returning home that night. A Sheriff's Report was issued in connection with the deaths and was introduced in evidence as plaintiff's Exhibit 2 in the trial Court.

It was established at the trial that Best's only sources of information concerning the event where the Sheriff's Report and two articles published immediately after the event (tr. pp. 113-116). Best admitted that it had made no attempt whatsoever at independent verification, that it did not seek to interview Mr. Varnish, any neighbors, any Sheriff's Deputies or "any person with knowledge" (tr. p. 116). It will be shown that none of the sources used by Best in any way substantiate the fundamental premises of the article and that they are false and fictionalized and were published with knowledge that they were false and in reckless disregard of the truth.

The action had originally been instituted in the Western District of Pennsylvania but had dismissed solely on the procedural ground that Best was not amenable to service in that district. The action was then brought in the Southern

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** References to Appendix A refer to Appendix A to the petition.

District of New York where Best conducts its principal business operations. A motion by Best to dismiss the complaint was denied by Judge Feinberg and a motion by Best for summary judgment, brought after examination before trial of Mr. Varnish, was denied by Judge Croake. The motions for directed verdict and judgment non obstante verdicto were denied by Judge MacMahon (Appendix B pp. B1-B2). All motions were fully briefed by both sides as was the appeal to the Court of Appeals for the Second Circuit.

Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction was conferred upon the district court by 28 U.S.C. §1332(a)(1).

Reasons for Not Granting the Writ

Rule 38 of this Court, Sub-Section 5, makes it abundantly clear that a writ of certiorari will be granted "only where there are special and important reasons therefor." It is clear that a review on a writ of certiorari "is not a matter of right, but of sound judicial discretion." Thus, Sub-Section 5 indicates the character of reasons that will be considered by this Court in granting certiorari. Sub-Paragraph (b) of Sub-Section 5 deals with decisions rendered by a Circuit Court of Appeals and states:

> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions;

> or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

None of these instances are here present. The decision of the Court of Appeals for the Second Circuit in no way conflicts with any decisions of other Circuit Courts of Appeals; it in no way involves questions of local law which in any way conflict with applicable local decisions; and the important question of federal law which was involved in this case has been fully settled by this Court by recent decisions. The decision of the Second Circuit in no way conflicts with the applicable decisions of this Court no has it departed from the accepted and usual course of judicial proceedings nor has it sanctioned a departure by the lower Court requiring the exercise of this Court's power or supervision.

No claim is made that the basic rules limiting the right of privacy insofar as they are applicable to publications is not an important question of federal law. Nonetheless, this issue is not in dispute in this case inasmuch as the Court below carefully spelled out in its charge to the jury. The governing principles heretofore carefully developed by this Court do not eliminate the right of privacy but instead condition it upon the establishment of certain facts. In this case, some evidence was presented to the jury with respect to each of the facts required to be established in order to establish the cause of action. In fact, the Petitioner makes no claim that the elements of invasion of privacy were not

properly explained to the jury but claims merely that the facts before the jury were insufficient to enable a jury to find these elements. There is no question that the jury might have agreed with the Petitoner's version of the facts, as the record contains considerable conflicting evidence and testimony. That is not, however, the test of whether or not a jury verdict is permitted to stand. Under Amendment VII to the United States Constitution, a jury verdict must not be interfered with where reasonable men may reasonably differ with respect to the evidence. Moreover, as will be shown, Appellate Courts must view the evidence in a light most favorable to the party obtaining the jury verdict and must given him the benfit of every inference favorable to him which the evidence fairly supports. It is clear that it is the trial judge who is in the best position to determine whether there was sufficient evidence to enable a jury to reach a verdict. It is clear that it is not the primary function of this Court to oversee that function particularly where there has been a intermediate appeal. There is no general guidance which will be offered by a determination in this case. The principles of law are well defined both as to the limitations imposed by the First Amendment on a cause of action for invasion of privacy and the scope of the Seventh Amendment with regard to a review of a jury determination. This case embarks on no new direction in either area and a determination by this Court would be purely a factual one based on the evidence in this particular case and giving no general guidance in any future case.

ARGUMENT

POINT I

Viewing the evidence in a light most favorable to Mr. Varnish, there clearly was an issue of fact as to which reasonable men might reasonably differ which required denial of Best's motion for a directed verdict made at the close of Mr. Varnish's case and renewed at the close of the entire case. There was sufficient evidence as a matter of law to justify the jury's verdict and its award of compensatory and punitive damages.

Although a variety of formulations have been established by various authorities as to the basis upon which the granting of a motion for a directed verdict or a motion for judgment notwithstanding the verdict may be permissible in view of the Seventh Amendment to the Constitution and the provisions of Rule 50 of the Federal Rules of Civil Procedure, the cases are uniform in seeking to uphold the jury verdict unless the facts were such that reasonable men could not differ. 5 Moore's Federal Practice ¶50.02, ¶50.07 [2] (2nd Edition 1951). Moreover, all inferences which could have reasonably been drawn from the facts in favor of the verdict of the jury are indulged in even though other inferences might reasonably be drawn which are contrary, *Continental Ore Co.* v. *Union Carbide,* 370 U.S. 690, 696 (1962); *Wilkerson* v. *McCarthy,* 336 U.S. 53 (1949) and which are more persuasive to the Court, *Compton* v. *United States,* 377 F. 2d 408 (8th Cir. 1967). Furthermore, where facts are controverted, the Court must disregard the facts and inferences which would impeach the verdict provided there are facts or inferences upon which reasonable men could have concluded as did the jury in the case under consideration.

In *Simpson* v. *Skelly Oil Company*, 371 F. 2d 563 (8th Cir. 1967), the Court said at page 567:

> "The standard applicable to consideration and disposition of a motion for a directed verdict or for a judgment N.O.V. *is whether plaintiff's evidence is sufficient to support a burden, ignoring defendant's evidence.* (Emphasis added)

The facts in this case with respect to each of the four elements of Mr. Varnish's cause of action as outlined by the Court in its charge to the jury justify the conclusions reached by the jury in this case.

1. Falsity, Fictionalization or Distortion

It has been shown and cannot be disputed that the trial court was required to view whatever evidence there is in the light most favorable to the party against whom the motion for a directed verdict and for judgment non obstante verdicto is made. As has been shown, this rule requires the Court to disregard *all* evidence favorable to Best and to consider *only* the evidence favorable to Varnish.

Nonetheless, in its Petition, Best prceeds to carefully martial all possible evidence in its favor and to totally ignore or minimize any meaningful evidence in favor of Mr. Varnish, as a smoke screen against the abuses established by Mr. Varnish to the satisfaction of both Courts and the jury below.

Inasmuch as the jury is entitled to draw reasonable inferences from the facts, it is entitled to evaluate the words in the context in which it reasonably finds that they have been used. Thus the word "happiest" could reasonably have been determined to have been used for the purpose of

creating a false, distorted picture of Mr. Varnish by placing him in an ironic circumstance rather than in the tragic circumstance which was thrust upon him.

Moreover, it is apparent that it is not the description of his wife of which Mr. Varnish compains, but the repeated statements in the article that Mr. Varnish himself could not "understand why the happiest wife and mother in the neighborhood suddenly decided to kill her 3 children and herself." It is the false impression given about Mr. Varnish and his role as husband that is a permissible inference which the jury could draw from the false statements about *his* lack of understanding of *his* "happy wife" (See e.g. tr. pp. 26-27, 69, 81-82).

The jury was also permitted to draw an inference that the quotation from the suicide letter constituted a distorted picture of what was actually written in the suicide note (compare quotation from article set forth at Footnote 1 to Appendix A p. A3:

> ". . . police found a note left by Mrs. Varnish for her mother. It said:
>
> > 'Just a note in explanation to let you know I am going to put the three children and myself to sleep forever. I can't go on.'
>
> It was an explanation that explained nothing, least of all to the shocked Varnish."

with actual letter set forth at Appendix A p. A6:

> "Just a note and explanation to let you know that I am going to put the three children and myself to sleep forever. I can't go on any longer. I see no future for the children or myself. Mitch is impossible and this is the only way to get away from him. I've

> had a miserable life since the time I met him. Tell Uncle Chris and Uncle Butch I'm sorry about the money they each loaned me in 1961. I didn't forget, but just never had the chance to pay it back. Also tell Marilyn I wanted to pay back the money that her and Stan helped us with, and of course, yourself. I owe you so much I'll never have to bother anyone anymore."

Again it is not the mere distortion of the contents of the suicide note but the attempt to tie Mr. Varnish and his alleged lack of understanding to this distortion. Thus, a partial and unrepresentative quotation of the suicide note is followed by a paragraph stating "It was an explanation that explained nothing, *least of all* to the shocked Varnish" (emphasis supplied) (Appendix A p. A3). Thus, again Mr. Varnish is portrayed as lacking in understanding of the circumstances of his "happy wife." And on this occasion he is described by the article as having the least knowledge or understanding of anyone.

Best's petition minimizes Mr. Varnish's repeated statements that he understood his family, that he knew his wife, that he understood his circumstances, and that the note constituted an explanation to his that he above anyone else could understand (tr. pp. 26-27, 69, 82).

The jury had a right to accept that testimony as true and to disregard any testimony to the contrary, particularly in view of the emotional state of Mr. Varnish during cross examination.

Regarding the significance of the "happiest mother" approach which pervaded the article, Best's witness Donahue admitted that the story was constructed in this manner at

the direction of an editor of the Enquirer who, the jury could reasonably infer, had no knowledge whatsoever concerning the incident (tr. pp. 117, 123-124). The article contains a headline running the full width of the page of the newspaper beginning "Happiest Mother." The picture of Mrs. Varnish is captioned in boldtype "Happy Mom." The first four paragraphs all deal with the conception of Mrs. Varnish as the "happiest mother" and the article concludes by referring to Mr. Varnish's lack of understanding concerning his "happiest" wife (see Appendix A pp. A2-A3).

One searches in vain for anything in the Sheriff's Report or in other articles indicating that Mrs. Varnish was the happiest woman in the neighborhood, or was known as the happiest woman in the neighborhood, or could be called anything but a quiet, despondent, depressed and tragic woman (see plaintiff's exhibit 2 in trial court.)

The jury could conclude as did the reporting officer on page 6 of plaintiff's Exhibit 2 in Trial Court "Apparently and from indications and also from a note left by Mrs. Varnish, . . . she became quite despondent over family conditions and was unable to go on any further."

The jury was entitled to give credence to Mr. Varnish's detailed statement on the fourth page of plaintiff's Exhibit 2 in Trial Court of the problems which existed in his family. From this statement the jury could infer an understanding which it could reasonably conclude conflicted with any attempt to portray the tragedy as high irony.

No source whatsoever was cited or found for the statement set forth in paragraphs 4 and 5 of the article which purport to quote "more than one neighbor" (Appendix A

p. A-2). The jury was entitled to infer from Mr. Donahue's statements that he simply made it up to sell newspapers (see e.g. tr. pp. 120-122, 130-131). Moreover, the Sheriff's Report demonstrates that even the neighbor who lived next door to the Varnishes and the neighbor who lived directly across the street from the Varnishes each did not know the family "too well" (plaintiff's exhibit 2 in Trial Court). This fact is further amplified by the statement on page 4 of of the Sheriff's Report that the Varnishes had been living in their home only since August 13th. It was established that the tragedy occurred on September 27th, not November 27th as the article erroneously stated. Thus, Mr. Varnish lived in the neighborhood for a brief period of less than a month and a half and Mrs. Varnish was relatively unknown even to her closest neighbors (see e.g. tr. pp. 36-37).

The jury could infer that Best also created intimate and morbid pictures without basis. Thus, the article states, "Varnish broke into tears, went from child to child, kissed each on the head and sobbed: 'We'll have to forgive her. We'll have to forgive her.' " (Appendix A p. 3.) These statements do not appear in the Sheriff's Report; they do not appear in any other article; they are complete fictionalization concerning the most intimate action of Mr. Varnish at the maximum moment of personal bereavement.

Thus it has been shown that it was not merely the false picture portrayed of Mr. Varnish's wife but the false painting of Mr. Varnish into this false picture which the jury was entitled to infer from the evidence before it.

2. Reckless Disregard of Truth

The state of mind of Best in publishing the distortions referred to previously is a question uniquely appropriate

for jury determination. See, e.g. *Brown* v. *United States Fidelity & Guaranty Co.*, 314 F.2d 675 (2d Cir. 1963). It has been established that the jury could reasonably conclude that the entire incident was slanted by Best to create a picture of irony. This plus the reckless assertion of Mr. Varnish's lack of understanding and the depicting of intimate details for which there is no basis in any of the sources used by Best, clearly justified an inference of reckless disregard of truth or falsity.

Could the jury infer that Best would print any distortion which would maximize its sale of newspapers without any attempt to verify its facts or without checking with the neighbors or with the police, or with Mr. Varnish, or with any member of his family? It is apparent that an inference of recklessness is permissible under these circumstances (See tr. pp. 105-131).

3. Outrage to the Sensibilities of Ordinary Persons

Acquino v. *Bulletin Co.*, 190 Pa. Super. 528, 154 A. 2d 422 (1959) which both parties recognize as the principal authority defining the law of privacy in Pennsylvania, makes clear that community outrage is a question for a jury and that their determination is not to be disturbed. This jury deliberated for over six hours and requested instruction on this precise point on two separate occasions. The jury here was entitled to conclude that the false, distorted, and fictionalized portrayal of Mr. Varnish could outrage the sensibilities of ordinary persons and that this outrage was foreseeable by Best.

The subject matter of this tragic event, if Best was even entitled to deal with it five and one half months later, cried

out for factual and straightforward treatment. Instead, the jury could reasonably conclude that it was converted into a morbid circus.

4. Damages

In 1966, the Second Circuit confirmed the long standing rule that a Court could not lightly displace the jury in determining the quantum and applicability of both compensatory and punitive damages. *Diapulse Corporation of America* v. *Birtcher Corporation,* 362 F.2d 736 (C.A. 2d Cir. 1966) *cert. denied,* 385 U.S. 801.

That action for libel was based on allegedly false statements that plaintiff's diathermy machinery was worthless. The jury awarded plaintiff $50,000.00 compensatory damages and $75,000.00 punitive damages. On appeal, the Court held the trial judge did not abuse his discretion in failing to order a remittitur. Quoting from *Dagnello* v. *Long Island R.R. Co.,* 289 F.2d 797 (2d. Cr. 1961) and *La France* v. *New York, N.H. & H. R.R. Co.,* 292 F.2d 649 (2d Cir. 1961), the Court held that the test is whether the amount is so high that it would be a *denial of justice* to permit it to stand, and that the Court would modify a verdict only when the "*jury awards something fantastic*" for the harm involved:

> ". . . the jury's award of compensatory damages of $50,000 cannot be described as 'fantastic' or as a 'denial of justice.' The same is true of the $75,000 award for punitive damages . . . The ward may be viewed as reflecting the moral sense of the community and its desire to prevent repetition of this wrong . . ."

Damages are allowed for mental anguish alone:

> "Substantial damages for injured feelings and mental anguish alone may be recovered for a wrongful

> invasion of the right of privacy and it is therefore not necessary to allege or prove special damages i.e. actual pecuniary loss or expenses, in order to sustain a recovery." *Hofstadter* v. *Horowitz*, The Right of Privacy, 259 (1964). See also *Kunz* v. *Allen*, 102 Kans 888, 172 Pac. 532 (1918). ("The principal ground upon which it is claimed the demurrer was sustained is that the plaintiff failed to prove any actual damages. This was not necessary."); *Brents* v. *Morgan*, 221 Ky. 765, 299 S.W. 967 (1927) ("He is entitled to recover substantial damages, although the only damages suffered by him resulted from mental anguish. The fact that damages cannot be measured by a pecuniary standard is not a bar to his recovery.')"

Once the jury found reckless disregard of truth and the publication of a false, distorted, fictionalized version of a tragic incident, the award of a $20,000.00 verdict can hardly be deemed excessive where there is evidence that, as a result of the article, Mr. Varnish attempted suicide (tr. p. 33), suffered the need for psychiatric attention (tr. p. 31), suffered unemployment (tr. p. 32), was shunned in his community (tr. p. 33), and became the victim of severe mental suffering (tr. pp. 31-36).

Although it should not be necessary for this Court to consider the substantive basis for the jury verdict in that Best made no exception to the Charge to the jury, nonetheless, Best has traveled so far afield in its petition that it may be well to summarize the law with respect to invasion of privacy simply to provide some perspective.

Invasion of privacy inherently involves a delicate balancing of freedom of the press against the right of an indi-

vidual to be left alone. Thus the following elements have been considered in arriving at the balance:

1) The nature of the subject, including whether the subject is a public figure by choice or a normally obscure person. See e.g. *Acquino, supra; Sutton* v. *Hearst*, 277 App. Div. 155, 98 N.Y.S. 2d 233 (1st Dep't. 1950);;

2) The nature of the publisher, including the type of publication sold by the publisher and the purpose and intent of the publisher in making the disclosures concerning the subject. See, e.g. *Acquino, supra; Binns* v. *Vitagraph Company*, 210 N.Y. 51; *Annerino* v. *Dell Publishing Co.*, 117 Ill App. 2d 205, 145 N.E. 2d 761 (1958);

3) The nature of the article, as to whether it is accurate, fictionalized, fanciful, dramatized or straight-forward, the intimacy of the subject, the necessity of publisher's use of subject's name or description in order to convey the meaning of the article and whether the nature of the article is such as to result in subject's being held in a bad light or being severely embarrassed or otherwise injured. See e.g. *Acquino, supra; Sutton, supra; Garner* v. *Triangle Publications*, 97 F. Supp. 546 (S.D.N.Y. 1951);

4) The nature of the information including the significance of the information, the currency of any aspect of the situation, and the justification for public interest in the information. See e.g. *Wagner* v. *Fawett Publications* No. 13541 [Seventh Circuit, June 18, 1962, discussed in the Right of Privacy: normative-descriptive confusion in the defense of newsworthiness, 30 Chicago L. Rev. 722, 726-727 (1963)]. The *Wagner* case concerned the publication of stories of the rape-murder of plaintiff's young daughter,

two months after the crime occurred. The Seventh Circuit reversed the District Court and held the publications actionable. The Court said:

> "Addressing ourselves to Fawcett's attack upon the complaint on the ground that matters set forth in its publication were newsworthy, of great public interest, and designed to inform and educate its readers, we are of the opinion that the trier of facts could find the articles in question, published months after the death of Mary-Lou Wagner and had ceased to be news and for that reason these articles were not published in news media but in magazines sold for the entertainment of their readers. By our holding we in no way suppress the legitimate publication of news; rather we condemn the pursuit for commercial purposes of those who may have been connected with matters which were, at the time of the occurrence, newsworthy. When the news media have served their proper function in reporting current events, private individuals involved therein sink back into the solitude which is the right of every person. That solitude involves a privacy which no publication has the right to thereafter invade solely for the purpose of selling to its readers lurid accounts of tragedy."

The Court reversed itself "solely on the ground that the events in question actually wer still current," reaching this decision on rehearing "on the basis of evidence showing that legal proceedings were taking place against the accused at the time of publication. The rule stated in the original opinion regarding decisive effect of the time lapse seems to have remained intact, limited only by the condition that the sequence of newsworthy events stemming directly from the original events would have come to an end." (30 Chicago L. Rev. *supra* at page 727).

5) The nature of the injury, including the foreseeability to the publisher of injury to the subject and the intensity of the actual injury suffered by the subject. See e.g. *Melvin* v. *Reed*, 112 Cal. 285, 297 Pac. 91 (1931).

The jury thus acted in accordance with the traditional and classic learning in this case where Mr. Varnish is normally an obscure individual who has never sought to become a public figure, and where Best has consistently engaged in catering to the sensational and the morbid, with almost no redeeming educational value, and where the article is fictionalized, dramatized and false, and deals with the most intimate acts, words and feelings of Mr. Varnish at a time of deepest shock and bereavement, and unnecessarily uses Mr. Varnish's name and description where almost no element of public significance can be shown with respect to the information, and where absolutely no currency exists with respect to any aspect of the situation, and where the injury to Mr. Varnish was intense and easily foreseeable by Best.

It is interesting to contrast this case with the leading Pennsylvania case, the *Acquino case, supra*:

In the *Acquino* case *supra*, the Pennsylvania Court relying upon the *Sutton* case, *supra* upheld a jury verdict against a legitimate newspaper, the Philadelphia Bulletin. In that case, the plaintiffs' daughter was married without their knowledge before a Justice of the Peace. The groom refused to engage in a church marriage and informed his bride that he had only married her to spite her parents. The plaintiff's parents caused the marriage to be dissolved. The newspapers reported the granting of the divorce as a current news item and, of course, no invasion of privacy occurred as a result. Nonetheless, 18 days after the Court

opinion in the divorce case, the Philadelphia Bulletin published a feature story which, like the story complained of in this case, included photographs and a headline in large letters across the page. The story, like the story in this case, gave the full names of subjects and specified the street where they lived. As in this case, the author permitted his imagination to roam through the facts, although, of course, his imagination could not conjure up such perverse pictures as kissing dead babies, as were conjured up by the author in this case. The Court held that even though the article about the marriage and divorce was based upon a newsworthy event, it constituted an invasion of privacy because its purpose was not to report past or current news of public interest, but to amuse and astonish the reading public. The *Acquino* case has become the leading case in Pennsylvania on the question of right of privacy. (See Patterson, Privacy: A Summary of the Past and Present, 35 Penn. Bar. Assoc. Quarterly 52 (1963)).

CONCLUSION

It has been shown that granting of a writ of certiorari would appear uniquely inappropriate in this case involving no dispute as to any governing principles of law. A decision by this Court in this case would offer no guidance to Courts in other cases in determining when the facts in each of those cases would justify permitting a jury to make a determination rather than removing the case from the jury. It would merely indicate the adequacy of the proof in this particular case. The kind of proof required in cases of this nature has been clearly defined by this Court and was properly applied by the Court in its charge to the jury as to which no exception was raised by the petitioner.

Moreover it has been shown that even if a writ of certiorari were to be granted, the decisions of the Courts below would be required to be upheld.

A conscientious jury has weighed and evaluated an article published by Best about Mr. Varnish, the facts before Best when it wrote the article, and the consequences of that article to Mr. Varnish. There was before it substantial evidence justifying reasonable men in concluding that Mr. Varnish's privacy had been invaded to his damage. The verdict of the jury should not be disturbed and the petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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